

**DECLARATION OF THOMAS A. SMART IN
SUPPORT OF PLAINTIFFS' MOTION FOR
PARTIAL SUMMARY
JUDGMENT ON DEFENDANT'S
COUNTERCLAIM AND AFFIRMATIVE
DEFENSE THAT THE KISSES TRADEMARK IS
PURPORTEDLY GENERIC**

**EXHIBIT H
REDACTED**

ORIGINAL

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UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF NEW JERSEY

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THE HERSHEY COMPANY AND)

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HERSHEY CHOCOLATE &) NO.

7

CONFECTIONERY CORPORATION,) 07-CV-1601

8

Plaintiff/Counterclaim) (SDW) (MCA)

9

Defendants,)

10

-vs-)

11

PROMOTION IN MOTION, INC.,)

12

Defendant/Counterclaim)

13

Plaintiff.)

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16

DATE: April 30, 2009

17

TIME: 10:19 a.m.

18

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Deposition of MICHAEL

20

ROSENBERG, held at the offices of Kaye

21

Scholer, 425 Park Avenue, New York,

22

New York pursuant to Agreement, before

23

Hope Menaker, a Shorthand Reporter and

24

Notary Public of the State of New York.

25

ELISA DREIER
REPORTING CORP.

950 Third Avenue Telephone: 212-557-5558
New York, New York 10022 Fax: 212-557-0050
Email: production@courtreportingedrc.com

1 - MICHAEL ROSENBERG -

2 A P P E A R A N C E S

3 KAYE SCHOLER LLP

4 Attorneys for the Plaintiffs and

5 Counterclaim Defendants

6 425 Park Avenue

7 New York, New York 10022

8 BY: THOMAS A. SMART, ESQ.

9

10 COWAN, LIEBOWITZ & LATMAN, P.C.

11 Attorneys for the Defendant and

12 Counterclaim Plaintiff

13 1133 Avenue of the Americas

14 New York, New York 10036

15 BY: RICHARD S. MANDEL, ESQ.

16

17 Also Present:

18 Lois Duquette, Esq.

19 Ronald Klem, Legal Assistant

20 George Munoz, Videographer

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1 - MICHAEL ROSENBERG -

2 Q. Would you state your name and
3 address for the record, please?

4 A. Sure. Michael Rosenberg and
5 I'm guessing you want my home address
6 or my business address?

7 Q. Business is fine, sir.

8 A. Yeah. Michael Rosenberg,
9 3 Reuten, R-E-U-T-E-N, Drive, Closter,
10 C-L-O-S-T-E-R, New Jersey, 07624.

11 Q. You are the president and CEO
12 of Promotion in Motion; is that
13 correct?

14 A. I am.

15 Q. And Promotion in Motion is
16 the defendant and counterclaim
17 plaintiff in this action; is that
18 correct?

19 A. Yes.

20 Q. Do you have any other
21 employment besides your employment as
22 president and the CEO of Promotion in
23 Motion and any positions you have with
24 related companies?

25 A. I am managing member of
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1 - MICHAEL ROSENBERG -

2 PIM Brands, LLC, which is a
3 manufacturing entity that's affiliated
4 with Promotion in Motion. I'm also
5 president of Promotion in Motion
6 Canada, and I believe I'm managing
7 member of Grupo de Alimentacion
8 Promotion in Motion Iberica, which is a
9 Spanish company, as well as Promotion
10 in Motion Mexico, which is a new
11 Mexican subsidiary company.

12 Q. And outside of Promotion in
13 Motion and its related entities do you
14 have any employment?

15 A. Not paid employment, no.

16 Q. When you say "not paid," what
17 are you thinking?

18 A. Well, I do charitable work.

19 Q. Okay. Now, you recall, sir,
20 that you and I met before and I took
21 your deposition back in February 2006?

22 A. I do.

23 Q. Okay. Have you had an
24 opportunity to look at that deposition
25 to review it before today's deposition?

1 - MICHAEL ROSENBERG -

2 A. I went through it, yes.

3 Q. When did you do that?

4 A. Mostly last night, just
5 scanned through it.

6 Q. Okay. I just want to do a
7 few housekeeping things.

8 You testified in that
9 deposition in February 2006, that there
10 were four members of the Board of
11 Directors of PIM. You, your father,
12 your brother, and one outside director,
13 Gerard Brennan.

14 Is that still the case that
15 those are the four directors?

16 A. There have been some
17 additions to the Board.

18 Q. Okay. Can you tell me what
19 those are?

20 A. Yes. There's a new Board
21 member named Dave Rajpurohit. Don't
22 ask me how to spell it; I will do my
23 best. R-A-J-P-U-R-H-O-I-T -- is a
24 member of the Board.

25 Likewise Rob Purcell, who is

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1 - MICHAEL ROSENBERG -

2 discussion was held off record.)

3 MR. SMART: 60, a copy of the
4 SwissKiss registration.

5 (Whereupon, Hershey
6 Exhibit 60 was marked at this
7 time.)

8 Q. Do you recognize Exhibit 60
9 as a copy of the SwissKiss registration
10 for the United States Patent and
11 Trademark Office?

12 A. Yes.

13 Q. And it issued on
14 September 28, 2004; is that correct?

15 A. Yes.

16 MR. SMART: Mark as
17 Exhibit 61 a letter on the Kaye
18 Scholer -- written by me on or
19 about February 14, 2005, to Mr.
20 Goldberg and Miss Kelvin -- Kevlin,
21 excuse me. Kevlin, K-E-V-L-I-N.

22 (Whereupon, Hershey
23 Exhibit 61 was marked at this
24 time.)

25 Q. Let me know when you've had a
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1 - MICHAEL ROSENBERG -

2 A. Right.

3 Q. Am I correct that that
4 statement of use was based on the sale
5 to Continental Concessions on
6 June 24, 2004?

7 A. Yes.

8 Q. Now, I'm going to show you
9 what was previously marked as
10 Exhibit 7.

11 MR. SMART: And I ever a
12 photocopy of it for you counsel.

13 MR. MANDEL: Thank you.

14 Q. Take a look at Exhibit 7.

15 A. Sure.

16 Q. And you previously testified
17 that Exhibit 7 is a copy of the pro --
18 product you sold Continental
19 Concessions in June 2004, correct?

20 A. From my recollection, yes.

21 Q. And that header --

22 A. With -- with -- with one
23 exception that I would point out.

24 Q. Yeah, sure.

25 A. I think what we ended up

1 - MICHAEL ROSENBERG -

2 doing was sticking a piece -- as you
3 could see, the chocolate bars were
4 falling. So I think what we ended up
5 doing is sticking cardboard into the
6 back of these in order to prevent them
7 from doing that.

8 Q. Okay.

9 A. So -- but it's basically the
10 same thing, double-sided, heavy
11 cardboard, I think.

12 Q. You're telling me as sold to
13 Continental Concession there was some
14 sort of backing?

15 A. Yeah. There was -- there was
16 cardboard, yeah.

17 Q. Okay. And the sale to
18 Continental Concessions was, at the
19 time of your deposition, the only sale
20 of SwissKiss product that PIM had made,
21 right?

22 A. Yes.

23 Q. And is that still the case
24 today?

25 A. It is.

1 - MICHAEL ROSENBERG -

2 Q. Pardon?

3 A. We're all consumers.

4 Q. Well, you understood the
5 context in which I -- I wasn't talking
6 outside this deposition, was I?

7 A. Well, we're just all
8 consumers.

9 MR. SMART: What's our next
10 number?

11 Let's mark as Exhibit 64
12 PIM's website as printed --
13 present -- printed out on
14 4/29/2009.

15 (Whereupon, Hershey
16 Exhibit 65 was marked at this
17 time.)

18 Q. Take a minute and look at --
19 at that. What we endeavored to do,
20 sir, was to print out the website as it
21 appear -- you're website, Promotion in
22 Motion's website as it appeared
23 yesterday, and we endeavored to print
24 every page.

25 A. Okay.

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1 - MICHAEL ROSENBERG -

2 Q. Are you familiar with your
3 website, sir?

4 A. Yeah. I haven't looked at it
5 in a while, to be honest with you, but
6 generally, yes.

7 Q. Back in February 2006, you
8 told me the SwissKiss product was not
9 listed in the PIM -- Promotion in
10 Motion's website at that time.

11 Do you recall that testimony?

12 A. Yes.

13 Q. And feel free to look at
14 Exhibit 65, but if you go to the "Our
15 Brand" section, I'd be correct, am I
16 not, that the SwissKiss brand is not
17 listed there?

18 A. It's not.

19 Q. And if you go to the company
20 overview page, there's no reference to
21 SwissKiss there, is there?

22 A. No. I don't think that
23 SwissKiss is on the site at this
24 particular juncture.

25 Q. And SwissKiss has never been

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1 - MICHAEL ROSENBERG -

2 currently purchasing it for?

3 A. I don't.

4 Q. Who would have that
5 information?

6 A. It would be available from
7 our purchasing records.

8 Q. Who's in charge of that
9 department?

10 A. Well, my father buys the
11 foreign currency. The actual
12 transactions are paid by accounts
13 payable. I'll -- I'll find out who --
14 who that would be.

15 Q. Who is in charge of accounts
16 payable?

17 A. Well, everything bubbles up
18 to the CFO today, Rob Purcell, but
19 there's -- I think the person who
20 actually writes the checks is Sandy
21 Czuch, C-Z-U-C-H?

22 Q. And at the time of your
23 deposition back in February 2006, you
24 said the suggested retail price for the
25 Suisse bars was anywhere from a \$1.29

1 - MICHAEL ROSENBERG -

2 to 2.99.

3 A. Yeah.

4 Q. Does that sound, correct?

5 A. Yes.

6 Q. Today too?

7 A. Yeah.

8 Q. What would you expect to find
9 a Suisse bar at retail today?

10 A. Well, everything imported has
11 gone up because of the deterioration of
12 the dollar versus the Euro, so it's
13 more skewing to the higher than the
14 lower.

15 Q. More towards 2.99 than 1.29?

16 A. Well, I don't know about -- I
17 mean, 2.99 would be the extreme, but
18 probably \$1.99 now.

19 Q. And have you been
20 continuously selling the Suisse bars
21 since June 2004?

22 A. Yes. We've been selling --
23 we've been selling product, yes.

24 Q. Has there been any
25 interruption in supply from Maestrani?

1 - MICHAEL ROSENBERG -

2 A. No interruption. We can get
3 product if we need it, if that's the
4 question.

5 Q. Do you advertise the Suisse
6 bar other than on your website?

7 A. No. I don't think we
8 advertise the product.

9 Q. What --

10 A. Currently. I mean, we have
11 advertised it. We've run
12 advertisements for it.

13 Q. Where have you run
14 advertisements?

15 A. In trade magazines mostly and
16 retailers that buy the product from us
17 have advertised the product, you know,
18 in their own materials.

19 Q. Which retailers are those?

20 A. You know, one that I know
21 I've seen ads for is National
22 Wholesale, which is a company I think
23 based out of Long Island that operates
24 retail stores. And, you know, they put
25 out circulars, and I remember my father